SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1973

JAN 28 1973

No. 72-1028

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Officer of Local 856, and on behalf of all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishment of the World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Petitioner,

vs.

UNITED STATES OF AMERICA, THE CITY OF NEW YORK and the PORT OF NEW YORK AUTHORITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N.Y.
BA 7-2618

THE BECK BAILEY SERVICE, INC. Telephone: (212) 447-1338

TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction of this Court 2

Questions Presented 2

Statement 3

Reasons for Granting the Writ 4

POINT I – Petitioners Were Deprived Of Their Constitutional Rights To Earn A Livelihood And Of Their Vested Rights To The Access And Use Of A Navigable River Whereby To Earn Their Livelihood. 5

POINT II – The Question Of Navigability Of A Stream Is One Of Federal Law And Not State Law 7

POINT III – The Availability Of A State Remedy Is Not A Valid Basis For Federal Court Abstention. 8

POINT IV – Matters Historically Mercantile Do Not Become Matters Of Public Welfare Unless Rationally Related To The Public Good. 10

POINT V – The Government May Not Authorize Alteration Or Interference With Navigation For Private Use In The Establishment Of A Real Estate Business. 11

POINT VI – The Power And Right Of An Individual To Earn A Livelihood Is In The Same Category As His Property Rights. 11

Conclusion 12

Appendix A – Order A-1

Appendix B – Opinion A-3

Cases Cited

B.A. Reynolds, etc., et al v. M.O. Sims et al; David J. Vann and Robert S. Vance v. Agnes Baggett, Secretary of State of Alabama, et al., 377 U.S. 533, 84 S.Ct. 1362 9

Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328 (1970) 8

Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083 (1969) 10

Hague, Mayor, et al v. Committee for Industrial Organization, et al., 307 U.S. 496, 59 S.Ct. 954 12

Jerry R. England et al v. Louisiana State Board of Medical Examiners et al., 375 U.S. 411, 84 S.Ct. 461 9

Kalur v. Resor, 335 F. Supp. 1 (1971) 10

Local Loan Co. v. Hunt, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1933) 12

Personal Finance Co. of Braddock v. United States, 86 F. Supp. 779 at page 784 6

Reubin Askew et al v. Robert H. Hargrave et al., 401 U.S. 476, 91 S.Ct. 856 12

Rivers and Harbors Appropriation Act of 1899, Sec. 13, 33 U.S.C.A. Sec. 407 3

Robert H. Hargrave et al v. Governor Claude R. Kirk, Jr., et al., 313 F. Supp. 944 (1970) 9

Rosa L. Stancil, Administratrix of the Estate of George Ben Stancil, Deceased v. United States of America v. J.R. Houska Company, Inc. and Shaw Paint & Wallpaper Company, Inc., 200 F. Supp. 36 (1961) 5

Sagastivelza v. Puerto Rico Housing Authority, 195 F. 2d 289 at page 292 6

Sandra J. Robertson et al v. Robert F. Ott et al; Virginia Hatcher et al v. Robert F. Ott, et al., 284 F. Supp. 735 (1968) 10

The Daniel Ball, 10 Wall 557, 563, 19 L.Ed. 999 7

U.S. v. Crow, Pope & Land Enterprises, Inc., 340 F. Supp. 25 .. 8

U.S.A. v. 531.10 Acres in Anderson County, South Carolina, and Duke Power Co. and Unknown Owners, 243 F. Supp. 981 (1965) 8

U.S.A. v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926) 8

U.S.A. v. State of Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931) 8

Utah v. United States, 403 U.S. 9, 91 S.Ct. 1775 (1971) ... 7

Other Authorities

Article 3, Section 1, et seq. U.S.C. 3

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

No.

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Officer of Local 856, and on behalf of all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishment of the World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Petitioner,

vs.

UNITED STATES OF AMERICA, THE CITY OF NEW YORK and the PORT OF NEW YORK AUTHORITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on October 30, 1972.

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York, by Bauman, J. dated March 28, 1972, on file in the record on appeal, pages 10 through 22, inclusive, reported at 340 Fed Supp. 175.

The decision was affirmed, without opinion, by the United States Court of Appeals for the Second Circuit on October 30, 1972.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

To what extent may Congress authorize sale for private use or authorize fill of a portion of a navigable river of the United States, so as to allow the same to be used as a garbage dump and land fill for a base for a mercantile real estate business.

Under what circumstances may our Federal Courts foreclose to American citizens redress for violation of fundamental constitutional rights to freedom to earn a living by reasonable means of access and use of the navigable rivers of the United States and continued enjoyment of vested rights.

Is abstention by a Federal Court a matter of discretion as to a complaint based on violation of fundamental constitutional rights to earn a livelihood by reasonable access and use of the navigable waters of the United States.

May the provisions of the Rivers and Harbors Appropriation Act of 1899, § 13, 33 U.S.C.A. § 407, be modified or nullified by a State Governor's statement that a river is non-navigable when, in fact, in actual operation it is a daily and continuous operation in use for maritime shipping employing thousands of citizens and hundreds of ships and spending millions of dollars for upkeep and repair of docks and piers.

May a private interest be granted tax privileges tantamount to waiver of millions of dollars of taxable revenue in the furtherance of a mercantile undertaking.

Does the enactment of ex post facto legislation ratifying the issuance of a permit by the Army Corps of Engineers eliminate the question of its validity under Article 3, § 1, et seq. U.S.C. in depriving petitioners of their means of livelihood and in violation of the Rivers and Harbors Appropriation Act of 1899, § 12, 33 U.S.C.A. § 407.

Did the Court below lack jurisdiction of the subject matter to provide declaratory and injunctive relief to the petitioners; by reason of the aforesaid legislation.

Where fundamental human civil rights are at issue under the Constitution involving the economic interests of the whole labor segment of an entire industry, does the Court have the discretion to apply the doctrine of abstension.

STATEMENT

Petitioner, on his own behalf, and on behalf of some 20,000 longshoremen of his Union, sought redress for interference by respondents with the petitioners' constitutional

rights to earn a living from having the use of navigable waters and access thereto, as a result of the wrongful acts of respondents in dumping debris and refuse into the river and filling an area of some 23.5 acres off the west side of Manhattan from Liberty Street to Barclay Street, covering an area which included piers #3 to #13, and the Court abstained from considering the question of preferential and unfair city tax benefits and exemptions.

Petitioners allege various denials of fundamental constitutional rights summarized in paragraph thirty-first of the complaint (31) and the affidavit of petitioner, Fred R. Field (45-51), which show a factual situation supporting the subject matter of the complaint.

The Court below affirmed from the Bench, without opinion, the decision of the District Court dismissing the complaint on erroneous holdings, including that the complaint was based on a challenge of ownership of certain piers when the complaint did not raise that question at all. The question was primarily deprivation and elimination of a large section of the Hudson River as a navigable stream and preferential and illegal tax benefits and exemptions, depriving citizens of some twenty-five million dollars in tax revenues a year.

REASONS FOR GRANTING THE WRIT

The Court below has sustained a decision by the Trial Court which established a radical concept in conflict with well established and uniform law, approving the dumping of unlimited quantities of demolished building materials and other foreign matter as fill in the Hudson River.

The civil rights of every citizen of the United States is affected by the holding in this matter, not only as to the rights to use and enjoyment of navigable waters of the United States, but even more so to the protection of our constitutional rights by our Federal Courts.

The Court below erroneously approved the Trial Court's holding as to abstention which was based, in part, that State Court remedies were available insofar as authorizing the use of a navigable river for realty purposes, in total disregard of the fact that the river was a continuous daily operation employing thousands of citizens and utilizing hundreds of ships and also maintaining and repairing docks and piers at an expenditure of millions of dollars.

POINT I

PETITIONERS WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS TO EARN A LIVELIHOOD AND OF THEIR VESTED RIGHTS TO THE ACCESS AND USE OF A NAVIGABLE RIVER WHEREBY TO EARN THEIR LIVELIHOOD.

The holding by the Court below deprived petitioners of vested rights and is in conflict with well established principles of law, as enunciated by this Court and many Circuit Courts of Appeal as appears by the following:

Rosa L. Stancil, Administratrix of the Estate of George Ben Stancil, Deceased v. United States of America v. J.R. Houska Company, Inc. and Shaw Paint & Wallpaper Company, Inc., 200 F. Supp. 36 (1961) at pages 44-45:

> "A retroactive statute cannot, of course, interfere with or divest vested rights. The great difficulty lies in the attempt

to assign a precise meaning to the term 'vested rights' as any attempt at a definition results only in a conflict in the decisions. Generally speaking, 'vested rights' refer only to those rights which will be protected from legislative interference."

Sagastivelza v. Puerto Rico Housing Authority, 195 F. 2d 289 at page 292:

"...The usual formulation of the rule with respect to retroactive civil legislation is that such legislation is constitutionally objectionable when it deprives a person of a completely vested right. Ettor v. City of Tacoma, 1913, 228 U.S. 148, 33 S.Ct. 428, 57 L.Ed. 773; Western Union Tel. Co. v. Louisville & N.R.R. Co., 1922, 258 U.S. 13, 42 S.Ct. 258, 66 L.Ed. 437; Crane v. Hahlo, 1922, 258 U.S. 142, 147, 42 S.Ct. 214, 66 L.Ed. 514; Coombes v. Getz, 1932, 285 U.S. 434, 442, 52 S.Ct. 435, 76 L. Ed. 866. See Rottschaefer, Constitutional Law, p. 548 (1939)."

Personal Finance Co. of Braddock v. United States, 86 F. Supp. 779 at page 784:

"[8-9] It seems equally clear from these same authorities that the legislative branch of government has no power by subsequent act to declare the construction of a previous act prejudicially affecting constitutional and vested rights which have attached under the prior act and before the passage of the declaratory law. As said in the Stockdale case, supra, 'It may be conceded that Congress cannot, under cover of giving a construction to an existing or expired statute, invade private rights with which it could not interfere by a new or affirmative statute."

POINT II

THE QUESTION OF NAVIGABILITY OF A STREAM IS ONE OF FEDERAL LAW AND NOT STATE LAW.

The Supreme Court of the United States as recently as June 7, 1971 in the case of *Utah v. United States,* 403 U.S. 9, 91 S. Ct. 1775 (1971), passed on the identical question as presented in the case at bar.

This supports petitioners' position that the Hudson River is part of the navigable interstate and international commercial highway and in no way interferes with the principle of public ownership of its bed.

The question of navigability is a federal question. The Court, quoting from the case of *The Daniel Ball,* 10 Wall 557, 563, 19 L.Ed. 999, stated at page 1776 in Utah supra:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.***"

The Court, in the Utah case supra, continued on page 1776:

> "While that statement was addressed to the navigability of 'rivers' it applies to all water courses. United States v. Oregon, supra, 295 U.S. at 14, 55 S.Ct. at 615."

The United States and not New York City was the sole owner and the only entity having any legal right to divest itself of ownership of the Hudson River and its river bed.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328 (1970)

As recently as March 21, 1972, in the case of *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F. Supp. 25 the Court reaffirmed the legal principle enunciated in the *Daniel Ball, supra*, and with reference to rivers navigable in fact quoted the Supreme Court as follows: (page 32)

> "...and they constitute navigable waters of the United States within the meaning of the Acts of Congress,..."

The decision by the Court below that a navigable water in fact can be declared as being non-navigable as the expedient or basis for dumping fill into said water and rendering it no longer navigable is in conflict with the holding by this Court that the question of navigability of a stream is one of federal law and not state law.

United States of America v. 531.10 Acres in Anderson County, South Carolina, and Duke Power Company and Unknown Owners, 243 F. Supp. 981 (1965)

United States v. State of Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931)

United States v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926)

POINT III

THE AVAILABILITY OF A STATE REMEDY IS NOT A VALID BASIS FOR FEDERAL COURT ABSTENTION.

Access to the protection of federal courts may not be foreclosed by the existence of state court remedies.

That abstention of the federal court is not justified when the question of constitutional and vested rights are involved, nor when the question of unfair preferential taxation is sought to be reviewed.

The conflict between the holding by the Court below and that of the Supreme Court was clearly shown by the following cases:

In the case of *Robert H. Hargrave et al v. Governor Claude R. Kirk, Jr., et al.*, 313 F. Supp. 944 (1970) the Court stated at page 947:

> "[1-3] We take up defendant's last argument first. We find no special circumstances in this case that would persuade us to apply the doctrine of abstention. The fact that a state remedy is available is not a valid basis for federal court abstention."

In the case of *B.A. Reynolds, etc., et al v. M.O. Sims et al; David J. Vann and Robert S. Vance v. Agnes Baggett, Secretary of State of Alabama, et al.*, 377 U.S. 533, 84 S.Ct. 1362, the Court stated at page 566:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

In the case of *Jerry R. England et al v. Louisiana State Board of Medical Examiners et al.*, 375 U.S. 411, 84 S.Ct. 461, the Court stated at page 416:

> "...we have on several occasions explicitly recognized that

abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.' Harrison v. N.A.A.C.P. 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed. 2d 1152; accord, Louisiana P. & L. Co. v. Thibodaux, supra, 360 U.S. at 29, 79 S.Ct. at 1073, 3 L.Ed. 2d 1058."

At page 417:

"...a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts."

POINT IV

MATTERS HISTORICALLY MERCANTILE DO NOT BECOME MATTERS OF PUBLIC WELFARE UNLESS RATIONALLY RELATED TO THE PUBLIC GOOD.

Citizens may maintain their actions on the basis of standing to sue for loss of tax revenues to the City.

Standing to sue exists when a litigant alleges that he has been caused injury in fact, economic or otherwise.

Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (1969)

Kalur v. Resor, 335 F. Supp. 1 (1971).

In *Sandra J. Robertson et al v. Robert F. Ott et al; Virginia Hatcher et al v. Robert F. Ott et al.*, 284 F. Supp. 735 (1968) the Court stated at page 737:

[4-6] "The Supreme Court has recently reiterated the incontestable proposition that a state may not make distinctions that are arbitrary or invidious. Avery v. Midland County, Tex., 1968, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed. 2d 45.

> In order for a statutory classification to satisfy the requirements of the Equal Protection Clause, it must be related to some proper governmental purpose. Truax v. Raich, 1915, 239 U.S. 33, 42; Schneider v. Rusk, 1964, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed. 2d 218."

The decision by the Court below is in conflict with the well established principle laid down by this Court that matters historically mercantile may not constitutionally be treated as matters of public welfare.

POINT V

THE GOVERNMENT MAY NOT AUTHORIZE ALTERATION OR INTERFERENCE WITH NAVIGATION FOR PRIVATE USE IN THE ESTABLISHMENT OF A REAL ESTATE BUSINESS.

The establishment of a real estate business or interference with the navigation, as well as the bed of the Hudson River, has no relation to proper governmental purposes and is unconstitutional.

See authorities cited under Point IV.

POINT VI

THE POWER AND RIGHT OF AN INDIVIDUAL TO EARN A LIVELIHOOD IS IN THE SAME CATEGORY AS HIS PROPERTY RIGHTS.

Petitioners have been denied their Constitutional right by having been deprived of the power of earning a living, which decision by the Court below is in conflict with the principle long established by this Honorable Court that the power and right of an individual to earn a livelihood is in the same category as his property rights.

Local Loan Co. v. Hunt, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1933)

Reubin Askew et al v. Robert H. Hargrave et al., 401 U.S. 476, 91 S.Ct. 856.

Hague, Mayor, et al v. Committee for Industrial Organization, et al., 307 U.S. 496, 59 S.Ct. 954.

CONCLUSION

The decision by the Court below sustaining the finding of the Trial Court opens the door to serious destruction of fundamental constitutional rights and merits review by this Honorable Court.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of October one thousand nine hundred and seventy-two.

Present: HON. J. EDWARD LUMBARD
HON. WILFRED FEINBERG
HON. JAMES L. OAKES
Circuit Judges,

Fred R. Field, Jr., individually and as President of The New York District Council of The International Longshoremen's Association, Executive Officer of Local 856 and on behalf of all Longshoremen, Seamen and Citizens whose rights are involved and or have an interest in the establishment of a World Trade Center in the Downtown Area of the Borough of Manhattan, City and State of New York,

Plaintiff-Appellant,

v.

United States of America, The City of New York And the Port of New York Authority,

Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Offices of Local 856, and on behalf of all longshoremen, seamen, and citizens whose rights are involved and/or have an interest in the establishment of a World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Plaintiffs,

-against-

UNITED STATES OF AMERICA, THE CITY OF NEW YORK and THE PORT OF NEW YORK AUTHORITY,

Defendants.

BAUMAN, J.

Defendants United States of America and Port of New York Authority have moved separately pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss this action for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. Defendant City of New York has joined in the motions. For the reasons stated below the motions of all defendants will be granted.

This action grows out of the construction of the World

Trade Center in downtown Manhattan. Plaintiff Field, President of the New York Council of the International Longshoremen's Association, sues individually and on behalf of a class consisting of "all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishing of a world trade center in the downtown area of Manhattan, City and State of New York."[1] As the complaint alleges, the Port of New York Authority is a municipal corporate instrumentality created in 1921 by compact of the States of New York and New Jersey with the consent of the Congress of the United States. It is responsible for maintaining bridges, marine and air terminals and other facilities within the New York Port District. The complaint further alleges the Port of New York Authority undertook the construction of certain buildings to be known as the World Trade Center after it had represented to the public that "the undertaking would be of financial and other economic benefit to the people of New York and that it would create improvement in all forms of commerce and trade."

The complaint rambles on alleging that instead of benefitting the people of New York and the Port District, creation of the World Trade Center has harmed them in the following ways:

1. Longshoremen and seamen have lost jobs and been deprived of a so-called "Constitutional right to the use and benefit of waterfront property and piers and the free use of navigable rivers" because land fill taken from the excavation at the site of the World Trade Center was used to fill in an area of approximately 23.5 acres in the Hudson River on the west side of Manhattan, eliminating, in the process, Piers #3-13 along the riverfront.

2. The citizens of New York City have been deprived of

tax revenue by the illegal grant of tax exempt status to the World Trade Center by the States of New York and New Jersey.

Plaintiff also claims there is uncertainty concerning the title to the upland created by the fill and as to the Port Authority's right to engage in real estate development. He questions its obligations under the bond issue which finances the Port Authority Trans-Hudson (PATH) railway system as well as the federal tax exempt status of interest on the bonds used to finance the World Trade Center.

I.

Turning first to the question of subject matter jurisdiction as to the defendant United States of America, plaintiff makes the boot-strap argument that jurisdiction exists because the action is for a declaratory judgment pursuant to Title 28, U.S.C.A., Section 2201. However, the Declaratory Judgment Act by itself does not confer subject matter jurisdiction on the federal district courts. *Skally Oil Company v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 672 (1950); *R.E.D.M. Corp. v. LoSecco*, 291 F. Supp. 53, 58 (S.D.N.Y. 1968), aff'd. 412 F. 2d 303 (2d Cir. 1969). Some additional statutory basis must be stated in the complaint. It must also be borne in mind that no questions involving federal taxes may be considered under the Declaratory Judgment Act. Title 28, U.S. Code, Section 2201.

Plaintiff's only jurisdictional basis other than the Declaratory Judgment Act is alleged to be the Federal Tort Claims Act, Title 28, U.S. Code, Section 1346. In that connection, he contends that the Secretary of the Army acting through the Corps of Engineers illegally issued a permit[2] which allowed the Port Authority (with the permission of New York City) to place

the fill generated by the construction of the World Trade Center behind the bulkheads along the Hudson River shoreline which formerly supported Piers 3 to 13. He states that this deprived longshoremen of their jobs and was in violation of their "Constitutional rights to the use of the piers."

Government regulation of economic and commercial activities has been sustained repeatedly in the face of claimed denials of "substantive due process of law" such as plaintiff makes here.[3] The piers in question, except to the extent that Congress imposed limitations, were under the control of the City of New York and were subject to alteration or removal for a public purpose. 1961 City Charter Sections 703, 704; Cf. *Montgomery v. Portland*, 190 U.S. 89, 105 (1903). Plaintiff does not allege a proprietary or franchise interest in the piers. Compare *Appleby v. City of New York*, 271 U.S. 364 (1926). His claim of damage rests on the assertion that he or the longshoremen or seamen who had worked there will find no employment at that place in the future. At most, this might constitute an interference with contract rights. But even assuming such an interference, the Federal Tort Claims Act by its terms provides that it shall not apply to "any claim arising out of ... interference with contract rights." Title 28, U.S. Code, Section 2680(h).

Furthermore, that Act prohibits the institution of an action thereunder "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." Title 28, U.S. Code, Section 2675. No such procedure appears to have been followed here.

It might be argued that the possibility of subject matter

jurisdiction exists under the judicial review provisions of the Administrative Procedure Act[4] or under the general "federal question" provisions of Title 28, U.S. Code.[5] However, no relief can be afforded by those Sections because of the enactment of legislation in 1968 which had the effect of ratifying the issuance of the permit and eliminating the question of its validity by declaring the filled area to be "nonnavigable waters within the meaning of the laws of the United States",[6] thus removing the matter from the ambit of Title 33, U.S. Code, Section 403.[7]

II.

The complaint fails to allege any statutory basis for jurisdiction as to defendants City of New York and Port of New York Authority. As noted above, any possible "federal question" jurisdiction was eliminated by statute and, as previously set forth, plaintiff's claim of deprivation of a Constitutional right to use the piers is frivolous.

His request for a declaration concerning the obligations of the Port Authority "to provide adequate financing for the continued operation of the Port Authority Trans-Hudson system" presents a non-justiciable issue; that is, there is no "actual controversy" of which the Court might assume jurisdiction. *A fortiori* there can be no such issue concerning potential limitations on future real estate operations in which the Port Authority may become involved. The claim concerning title to the upland created by placing the fill in the river is purely a question of state law and does not raise any federal question.

Lastly, plaintiff claims the grant of tax exempt status to the World Trade Center by the States of New York and New Jersey constitutes 'an unfair competitive advantage to a real

estate development." This may be read as charging a violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, although that is not specifically alleged. If that is what is intended, the Court would have jurisdiction, in its discretion, under the Declaratory Judgment Act to determine his request for a declaration of "what, if any, immunity from taxation the defendant Port of New York Authority has or would be entitled to in the construction, development and operation of the contemplated World Trade Center."[8] I choose to decline to entertain that claim.

Issues of state taxation and public law are more appropriately heard in the state courts, at least in circumstances such as these. Moreover, the New York Courts have already entertained a number of suits attacking the constitutionality of that legislation[9] and have uniformly resolved them in favor of the project. See *Courtesy Sandwich Shops v. Port of New York Authority*, 12 N.Y. 2d 379 (1963), *appeal denied for want of a substantial Fed. question*, 375 U.S. 78 (1963); *In the Matter of the Port of New York Authority* (World Trade Center), 18 N.Y. 2d 250 (1966), *cert. denied sub. nom. McInness v. Port of New York Authority*, 385 U.S. 1006 (1967); *cf. Bush Terminal Co. v. City of New York et al.*, 282 N.Y. 306 (1940).

Courtesy, supra, presented a challenge to the statutory authorization granting eminent domain powers to the Port Authority for the purposes of the World Trade Center. The Court of Appeals found that the project was for a "public purpose" and sustained the validity of the entire legislative chapter.

Finally, plaintiff's sincerity in raising the issue of tax

exemption is open to question. He has not briefed that issue in the five years which have elapsed since this suit was filed. Additionally, in his Memorandum in Opposition to the Motion to Dismiss filed April 30, 1971, plaintiff stated that this entire suit could be resolved if the Port Authority went forward on a stipulation filed July 24, 1967 providing for the creation of a committee to study the feasibility of constructing a pilot terminal for merchant container vessels on the new land fill site thereby preserving jobs for longshoremen. This is apparently his real concern and that is an issue into which this Court should not be drawn.

In view of this factor and the continued findings by the highest tribunal of the State of New York that the World Trade Center was created for a "public purpose" and in view of the findings by that Court that the chapter of legislation authorizing that project is constitutional, I decline to exercise my discretion under the Declaratory Judgment Act to entertain this claim.

For the above reasons, the motions of al parties to dismiss is granted.

So ordered.

Dated: New York, N.Y.
March 28, 1972

Arnold Bauman
U.S.D.J.

FOOTNOTES

[1]Because of the disposition rendered, it is not necessary to determine whether this is in fact a class action under Rule 23.

[2]The permit was issued pursuant to Title 33 U.S.C. Section 403, which provides:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be Lawful to build or commence the building of any wharf, pier, dolphin boom, weir, break-water, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

[3]See the long line of cases following *Nebbia v. New York*, 291 U.S. 501 (1934) (state legislation) and *United States v. Carolene Products*, 304 U.S. 144 (1938) (federal legislation).

[4]Title 5 U.S.C. Section 701, et seq.

[5]Title 28 U.S.C. Sections 1331, 1337.

[6]Pub. L. 90-483, Title I, Section 113, Aug. 13, 1968, 82 Stat. 736, Title 33 U.S.C. Section 59c-1, which provides:

"Those portions of the East and Hudson Rivers in New York County, State of New York, lying shoreward of a line within the United States Pierhead Line as it exists on August 13, 1968, of this Act and bounded on the north by the north side of Spring Street extended westerly and the south side of Robert F. Wagner, Senior Place extended eastwardly, are hereby declared to be nonnavigable waters of the United

States within the meaning of the laws of the United States. This declaration shall apply only to portions of the above described area which are bulkheaded and filled. Plans for bulkheading and filling shall be approved by the Secretary of the Army, acting through the Chief of Engineers, on the basis of engineering studies to determine the location and structural stability of the bulkheading and filling in order to preserve and maintain the remaining navigable waterway. Local interests shall reimburse the Federal Government for any engineering costs incurred under this section."

[7]See footnote 2 supra. The parties in their memoranda to this Court and in oral argument have raised the issue of the effect of Title 33 U.S. Code Section 59c-1 on this action. All parties agree that the legislation applies to the land fill area in question here; their dispute, however, concerns the legal effect of that legislation on the land fill area.

[8]See Complaint, Request For Relief, Par. 6.

[9]Chapter 209 of the 1962 Session Laws of New York [N.Y. Unconsolidated Laws Section 6601 et. seq. (McKinney, 1971)] provides the authorization for the World Trade Center. Section 11 of that chapter grants tax exempt status to the project and provides in pertinent parts:

"The port authority shall be required to pay no taxes or assessments upon any of the property acquired or used by it for any of the purposes of this act or upon any deed, mortgage or other instrument affecting such property or upon the recording of any such instrument. However, to the end that no municipality shall suffer undue loss of taxes and assessments by reason of the acquisition and ownership of property by the port authority for any of the purposes of this act, the port authority is hereby authorized and empowered, in its discretion, to enter into a voluntary agreement or agreements with any municipality whereby the port authority will undertake to pay in lieu of taxes a fair and reasonable sum or sums annually in connection with any real property acquired and owned by the port authority for any of the purposes of this act.***."

(40,884)

FEB 20 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1028

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Officer of Local 856, and on behalf of all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishment of the World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Petitioner,

against

UNITED STATES OF AMERICA, THE CITY OF NEW YORK, and THE PORT OF NEW YORK AUTHORITY,

Respondents.

BRIEF OF CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIOARI

NORMAN REDLICH,
Corporation Counsel
of the City of New York,
Attorney for Respondent
City of New York,
Municipal Building,
New York, New York 10007.
(212) 566-4337

STANLEY BUCHSBAUM,
MILTON HARRIS,
LEONARD KOERNER,
of Counsel.

INDEX

PAGE

Preliminary Statement 1

Issues Involving the City of New York 2

Facts 2

Opinions Below 4

ARGUMENT—The land under water in controversy was filled by its owner, the City of New York, with the concurrence of the federal government in an exercise of lawful power. Plaintiff, without a property interest in the land under water, has no right under federal or state law to oppose its reclamation and the incidental elimination of the piers erected over it 5

Conclusion 10

TABLE OF AUTHORITIES

CASES:

Appleby v. *City of New York*, 271 U. S. 364 (1926) 5, 7

Appleby v. *City of New York*, 235 N. Y. 351, rev'd o.g. 271 U. S. 364 5–6

Delaware and Hudson Coal Co. v. *Lawrence*, 2 Hun. 163 (N. Y. Sup. Ct., 1873), affd. 56 N. Y. 612 (1874) 7

Gilman v. *Philadelphia*, 3 Wall. (70 U. S.) 713 (1865) 9

Issues Involving the City of New York

1. Do longshoremen who work or seek work on Hudson River piers have a constitutional or other federal right entitling them to a declaration that the City of New York, in a regular exercise of power over its water-front, may not demolish piers on city-owned land under water and, under a permit granted by the United States Army, Corps of Engineers, reclaim the land under water by deposit of fill from excavation for the adjacent World Trade Center project?

2. Plaintiff's statement of "Questions Presented" raises the issue of "tax benefits discriminatory to the general public" (Pet., p. 3). His brief fails to develop the matter. The issue is frivolous in view of the allegation in the complaint that the City of New York is vested with power to levy and collect taxes on all real estate except such "as is lawfully exempt from such taxes" (p. 25, par. Tenth). The World Trade Center is exempt from such taxation. N. Y. Unconsol. Laws, § 6611 (McKinney's Ed., Book 65, Part 2.)

Facts

In this action for declaratory judgment, the president of a longshoremen's union sues individually and on behalf of all longshoremen, seamen and citizens "whose rights are involved and/or have an interest in the establishment of [the] World Trade Center" (Caption of complaint). The complaint challenges not only the establishment of the World Trade Center but a related landfill of 23.5 acres of land submerged under the Hudson River, south of the Trade Center, for the site of Battery Park City.

Pursuant to an agreement between the City of New York and the Port of New York Authority, the fill is being taken from excavation for the World Trade Center proj-

ect (13).* The reclamation of the land under water, approved by a permit of the Department of the Army, Corps of Engineers, involves the destruction and elimination of Piers 3-13 (28). The Secretary of the Army determined, on the basis of engineering studies, that the reclamation "is adequate to preserve and maintain the remaining navigable waterway" (59).

After this action was commenced, Congress approved the action of the Army Corps of Engineers in granting the permit. Legislation enacted in 1968 provides in part:

> "Those portions of the East and Hudson Rivers in New York County, State of New York, lying shoreward of a line within the United States Pierhead Line as it exists on the date of enactment [August 13, 1968] of this Act, and bounded on the north by the north side of Spring Street extended westerly and the south side of Robert F. Wagner, Senior Place extended eastwardly, are hereby declared to be non-navigable waters of the United States within the meaning of the laws of the United States." 33 U. S. C. § 59c-1; Pub. L. No. 90-483, § 113 (Aug. 13, 1968).

Stripped of its rambling and generalized allegations of the wrongful character of the several actions of the defendants, the complaint attacks the Trade Center's tax subsidy as an

> "unfair competitive advantage to a real estate development undertaking and operation to the prejudice of the plaintiffs",

which constitutes favoritism to limited groups (27-28).

The landfill operation and pier elimination is claimed to be

> "in violation of the Constitutional rights of the plaintiffs to the use and benefit of waterfront property and piers and the free use of navigable waters" (28).

---

* Unless otherwise indicated, numbers in parentheses refer to pages of the Appendix in the Court of Appeals for the Second Circuit.

So far as the piers are concerned, the complaint alleges that the members of plaintiff's longshoremen's union, dependent on activity on the downtown Hudson River piers, have lost their means of livelihood (30-31). Beyond identifying Piers 3-13, the complaint is silent as to whether the piers were in use and service by any members of the union.

Opinions Below

(1)

So far as the City of New York is involved, the District Court for the Southern District of New York (BAUMAN, J.), ruled there is not statutory or other basis for jurisdiction (Pet., pp. A 3-A 9).

It held that the piers, except to the extent that Congress imposed limitations, were under municipal control and their removal for a public purpose did not involve a denial of due process of law, and that plaintiff's claim of a constitutional right to use the piers is frivolous.

On the issue of tax exemption, the Court declined to entertain plaintiff's requests for a determination under the Declaratory Judgment Act. The issue, it ruled, would be more appropriately heard in the New York State courts.

(2)

The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court, without opinion.

ARGUMENT

The land under water in controversy was filled by its owner, the City of New York, with the concurrence of the federal government in an exercise of lawful power. Plaintiff, without a property interest in the land under water, has no right under federal or state law to oppose its reclamation and the incidental elimination of the piers erected over it.

(1)

The City of New York's title to the land under water surrounding the island of Manhattan is derived from grants in colonial charters and from the State of New York. In 1807 the State of New York granted to the City a strip of land under water along the westerly side of the island extending 400 feet into the Hudson River. *Appleby* v. *City of New York*, 271 U. S. 364, 366 (1926). In 1871, pursuant to statute, letters patent were given to the City granting lands under water in the Hudson River, 1,000 feet outshore of the east line of West Street, between the Battery and West 11th Street. The letters patent, dated September 28, 1871, are recorded in Liber 1194, Cp. 651. The reclaimed area in question is within the 1,000 foot line. See copy of tracing at page 57 of the Appendix. It is clear that these lands under water were conveyed to the City "to enable it to fill them up as the interest of the city might require, and to regulate and control the wharves and wharfage." *Langdon* v. *Mayor*, 93 N. Y. 129, 144 (1883).

The title derived from the state is subject to the paramount control of Congress through laws passed in pursuance of the constitutional power to regulate commerce. *People* v. *N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, 78 (1877). The paramount control of Congress is limited to matters pertaining to or affecting navigation or commerce; and, subject to such limitation, control of navigable waters is vested in the state. *Appleby* v. *City of New York*, 235

N. Y. 351, 361, 139 NE 474, 475-476 (1923), rev'd. o.g., 271 U. S. 364 (1926).

Coupled with the City's title to land under water is a delegation of the State's sovereign power over the waterfront. This power, generally conferred on all cities by New York General City Law, § 20, subd. 8, is restated in New York City Charter, § 1303, subd. 2.

The actions taken by the City and by the Port of New York Authority on its behalf in the elimination of Piers 3-13 and the reclamation of the land under water were lawfully accomplished under the powers granted to the City and approved, so far as they affect navigation, by the federal government. Neither the complaint, nor plaintiff's brief, challenges the regularity of pier elimination or land fill so far as the City's power is concerned. Plaintiff's challenge takes the form of conclusory charges that the Army's permit was illegally issued and that the elimination of the piers and dumping of fill violated unspecified constitutional rights of the plaintiff and members of his union (28; Pet., pp. 3-12).

The specifics of the challenge are discernible only from plaintiff's affidavits submitted in opposition to the motions to dismiss the complaint. He argues that "the public has a constitutional right to the free and unrestricted use of the navigable waters of the United States" (49). The Hudson River, his argument continues, "has been destroyed of its former navigation capacity by creation of a land fill in violation of federal statutes" (44). The filled land, he says, has been unlawfully alienated for private use (50). To the extent that plaintiff's argument is directed to the permit issued by the Department of the Army, although it poses a federal question, it is without merit. The Obstructing Navigable Waters Act (33 U. S. C. § 403) permits filling of land under water on plans recommended to the Secretary of the Army by the Corps of Engineers. The Secretary has determined that the reclamation in controversy "is adequate to preserve and maintain the remaining navigable

waterway" (59). Plaintiff does not have standing to challenge that determination. *Sound Marine & Machine Corp.* v. *Westchester County,* 100 F. 2d 360, 363 (2d Cir., 1939), cert. den. 306 U. S. 642 (1939). In addition to the permit, plaintiff must overcome the Congressional declaration of the non-navigability of the waters in question (*ante,* p. 3).

To the extent that plaintiff argues, apart from the matter of the Department of Army permit, that the navigable capacity of the Hudson River has been impaired, he does not raise a federal question involving the City of New York. The right of navigation is a public right belonging to the people at large and may be regulated by the State of New York, and by the City under its delegated power, subject to vested rights of individuals and the public trust in the river as a waterway. *Appleby* v. *City of New York, supra,* 271 U. S. at pp. 394-395.

Plaintiff and the longshoremen he represents do not have a proprietary or other special interest in the river, the piers, or the shorefront. Plaintiff suggests that a longshoreman's right to earn a livelihood is the equivalent of a property right (Pet., p. 11). The character and extent of such employment does not give them greater rights in the river than the general public on whose behalf the City acts. *Delaware & Hudson Coal Co.* v. *Lawrence,* 2 Hun 163, 194 (N. Y. Sup. Ct., 1973), aff'd 56 N. Y. 612 (1874).

Nor does the public trust in the preservation of the river as a water highway entitle plaintiff to challenge the land fill. A navigable waterway need not be maintained at its original width. As stated in *Appleby* v. *City of New York, supra,* 271 U. S. at p. 394:

> "The control of the state for purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

Both of these conditions are satisfied. A land fill extending 700 feet into a mile-wide river, approximately to the old pierhead line, does not impair the navigability of the river. Under New York law, the use is public although the reclaimed land is not devoted to commerce or navigation. N. Y. Gen. City Law, § 20, subd. 8.

Subdivision 8 was amended recently to permit use of the waterfront and waterways of municipalities for any business or public purpose, as well as for commerce and navigation. The amendment recognizes the need for maximum utilization of available land resources to relieve "space pressures upon municipalities for recreation, housing and commercial sites" (2 McKinney's *Sessions Laws of New York* [*1970*], p. 3022). Indeed, for over three hundred years the City of New York has been developed by reclamation of surrounding land under water.

In reality, plaintiff does not complain about his right to navigate the Hudson River, that is, to use it as a water highway. His grievance is that Piers 3-13 have been destroyed as an incident of the land fill. As the District Court noted, plaintiff would be content if the reclaimed land had been used as a pilot terminal for containerized shipping (18). This is a tacit recognition of the decrepit state of the piers, a condition that was recognized in the preamble to the enabling legislation for Battery Park City, in part, as follows (N. Y. Pub. Author. Law, § 1971):

> "It is hereby found and declared that there exists on the lower West side of the county of New York, North of Battery Park and on and adjacent to the Hudson River, a blighted area marked by substandard, insanitary, deteriorated and deteriorating conditions, in which there exists obsolete and dilapidated buildings and structures, including piers * * *
>
> It is further found and declared that such area is no longer suitable or useful for piers * * *
>
> It is hereby declared that the improvement of such area, the elimination of pier facilities and of the

> present structures therein, and the replanning, reconstruction and redevelopment of such area including the filling of the Hudson River at such area up to the present pierhead line, the preparation of such land for development * * * is necessary for the prosperity and welfare of the people of the City of New York and of the state as a whole, and is a public use and public purpose * * *."

Cleared of its navigational coloring, the complaint does not state a cause of action against the City of New York. The City has plenary power over its piers. N. Y. Gen. City Law, § 20, subd. 8; New York City Charter, § 1303, subd. 2. There being no conflict with federal jurisdiction, the City may exercise such power as it sees fit. *Gilman* v. *Philadelphia*, 3 Wall. (70 U. S.) 713, 729 (1865).

(2)

In support of his position, the petitioner cites *Utah* v. *United States*, 403 U. S. 9 (1971) (Pet., p. 7). *Utah* involved conflicting claims between Utah and the United States to the shorelands around the Great Salt Lake. Utah's claim to the lands depended upon whether the lake was navigable at the time Utah achieved statehood in 1896. If the lake was then navigable, Utah would be entitled to the shorelands. This Court, stating that the question of navigability was a federal question, had directed a special master to determine whether the Great Salt Lake was navigable in 1896. His report found that the lake was navigable. In confirming the report of the master, the Court awarded the lands to Utah.

In this case, unlike in *Utah*, Congress specifically resolved the federal question by declaring the filled area to be "non-navigable" waters within the meaning of the laws of the United States (*ante*, p. 3). Additionally the petitioner in this case, unlike the plaintiff State in *Utah*, does not have a proprietary interest in the waterway. Any question relating to navigability of the Hudson river could only be raised by the State of New York or by New York City under its delegated power (*ante*, p. 7).

CONCLUSION

The petition for writ of certiorari should be denied.

February 20, 1973.

Respectfully submitted,

NORMAN REDLICH,
Corporation Counsel
of the City of New York,
Attorney for Respondent
City of New York.

STANLEY BUCHSBAUM,
MILTON HARRIS,
LEONARD KOERNER,
of Counsel.

FREE COPY

Supreme Court, U. S.
FILED
FEB 23 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1028

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Officer of Local 856, and on behalf of all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishment of the World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Petitioner,

against

UNITED STATES OF AMERICA, THE CITY OF NEW YORK, and THE PORT OF NEW YORK AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PATRICK J. FALVEY
General Counsel of, and Attorney for Respondent, The Port Authority of New York and New Jersey
Office and P. O. Address
111 Eighth Avenue
New York, New York 10011
Tel. 620-7380

On the Brief:

JOSEPH LESSER
Assistant General Counsel and Chief, Opinions and Appeals Division

ISOBEL E. MUIRHEAD
Deputy Chief, Opinions and Appeals Division

RALPH SALTZ
Attorney

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Opinion Below	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Argument	5
Conclusion	12
Proof of Service	13

TABLE OF AUTHORITIES

CASES:

Bush Terminal Co. v. *City of New York*, 282 N.Y. 306, 26 N.E. 2d 269 (1940) 10, 11

Courtesy Sandwich Shop, Inc. v. *Port of New York Authority*, 12 N.Y. 2d 379, 190 N.E. 2d 402, 240 N.Y.S. 2d 1 (1963), *appeal dismissed for want of a substantial Federal question*, 375 U.S. 78 (1963), *rehearing denied*, 375 U.S. 960 (1963) .. 10

Field v. *United States*, 340 F. Supp. 175 (1972) 1, 6, 9, 10, 11

Jolles Foundation, Inc. v. *Moysey*, 250 F. 2d 166 (2d Cir. 1957) 9

Matter of Port of New York Authority (World Trade Center), 18 N.Y. 2d 250, 219 N.E. 2d 797, 273 N.Y.S. 2d 337 (1966), *certiorari denied sub nom. McInnes* v. *Port of New York Authority*, 385 U.S. 1006 (1967) 10

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1028

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Officer of Local 856, and on behalf of all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishment of the World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Petitioner,

against

UNITED STATES OF AMERICA, THE CITY OF NEW YORK, and THE PORT OF NEW YORK AUTHORITY,

Respondents.

ON APPEAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinion Below

The District Court for the Southern District of New York dismissed portions of the complaint for failure to state a claim upon which relief can be granted and other portions for lack of Federal Court jurisdiction. Its opinion, written by Judge Arnold Bauman, is reported at 340 F. Supp. 175 and is set forth in the appendix to the petition at pages A-3—A-11. The Court of Appeals for the Second Circuit affirmed the District's Court's decision from the bench, without opinion, on October 30, 1972.

Questions Presented

(1) Is petitioner being denied any Federal right, constitutional, statutory or otherwise (a) by the construction of a landfill project which Congress has expressly authorized; (b) by the construction of the World Trade Center whose authorizing legislation has previously been upheld by this Court; or (c) by the operation of the Port Authority Trans-Hudson Railroad (PATH) whose authorizing legislation has likewise been previously upheld by this Court?

(2) Does Federal Court jurisdiction exist over an action seeking a declaratory judgment concerning the tax status, under Federal law, of the World Trade Center and/or of The Port Authority of New York and New Jersey which constructed and is operating the Center?

(3) Does petitioner's prayer for a judicial declaration concerning the obligations of The Port Authority of New York and New Jersey "to provide adequate financing for the continued operation of the Port Authority Trans-Hudson system" present a case or controversy within the jurisdiction of the Federal Courts?

Statutes Involved

The pertinent statutes, 33 U.S.C. § 403 and 33 U.S.C. § 59e-1, are set forth in the appendix to the Petition at pages A-10—A-11.

Statement of the Case

This purported class action seeking declaratory relief was brought by petitioner, individually and as President of the New York District Council of the International Longshoremen's Association "on behalf of all longshoremen, seamen and citizens whose rights are involved and/or

have an interest in the establishment of a World Trade Center in the downtown area of the Borough of Manhattan." The respondents are the United States of America, the City of New York and the Port Authority of New York and New Jersey (formerly the Port of New York Authority). The last named respondent is an agency of the States of New York and New Jersey created in 1921 by an interstate compact between them to which Congress consented. N.Y. Unconsol. Laws §§ 6401 *et seq.* (McKinney's 1921); N.J.S.A. §§ 32:1-1 *et seq.* (1921); 42 U.S. Stat. 174 (1921).

The action was commenced on May 2, 1967, a few months after the Port Authority was granted a permit by the Corps of Engineers, dated December 21, 1966, to place fill from the excavation at the World Trade Center site in the nearby Hudson River. The Port Authority was directed to construct the World Trade Center by legislation of the two States enacted in 1962. N.Y. Unconsol. Laws §§ 6601 *et seq.* (McKinney's 1962); N.J.S.A. §§ 32:1-35.50 *et seq.* (1962).

The landfill development, which necessitated the elimination of several piers owned by the City, was one of the earliest steps in the effectuation of the City's comprehensive plan to revitalize lower Manhattan. One of the recommendations contained in this comprehensive plan, known as the Lower Manhattan Plan,[1] is the redevelopment of the Hudson River waterfront through the elimination of deteriorating piers and the placing of fill in the river on City-owned underwater property to create additional land for housing, recreational and commercial development.

The availability of fill from the World Trade Center site made it possible for the City to receive over 23 acres of new upland area free of charge and the closeness of this

[1] The Lower Manhattan Plan, New York City Capital Project ES-1 (1966).

area enabled the Port Authority expeditiously to dispose of huge quantities of debris and excavation material.[2] The landfill project was formally approved by the Board of Estimate of the City of New York on June 22, 1967,[3] and the land created by the project has now been leased by the City to the Battery Park City Authority for residential development. This public authority was created by State statute in 1968 for the express purpose of redeveloping the "blighted area" north of Battery Park and on and adjacent to the Hudson River which the Legislature found was no longer "suitable or useful for piers or for facilities appurtenant to the loading and unloading of commercial cargo." N.Y. Pub. Auth. Law §§ 1970-71 (McKinney's 1968).

The same year, Congress acted to facilitate the financing of the Battery Park City project. This was accomplished by legislation declaring certain portions of the Hudson River "non-navigable waters of the United States" when "bulkheaded and filled". 33 U.S.C. § 59c-1.

The area mentioned in the 1968 Congressional statute embraces the whole of the landfill project to which petitioner objects. Indeed, the non-navigable portions of the Hudson River are currently in the process of being expanded. On January 25, 1972, a permit was issued to the Battery Park City Authority pursuant to the above statute for a further landfill development, extending beyond that which is challenged here. The new project will make the now completed landfill project, which is the subject of this action, an inland area.

Petitioner's brief in the Court of Appeals (Plaintiff-Appellant's Brief, p. 3) makes it clear that the primary

---

[2] Journal of Proceedings of the Board of Estimate of the City of New York, 1967, Vol. IV, p. 3781 (May 18, 1967).

[3] Journal of Proceedings of the Board of Estimate of the City of New York, 1967, Vol. V, pp. 4368-78.

reason for the institution of this suit was the landfill project and the concommitant destruction of several City piers on which members of petitioner's union allegedly earned their livelihood. The rambling complaint charges, and the petition continues to allege, that the landfill project as well as the elimination of the piers violate petitioner's constitutional rights to the use and benefit of waterfront property and piers and the free use of navigable waters.

The complaint also sets forth objections to the World Trade Center's tax exempt status under both Federal and State law, and questions the Port Authority's financial obligations regarding the Port Authority Trans-Hudson Railroad (PATH). Petitioner's objections to the Trade Center obviously arise from the fact that it was the construction of the Center which made possible the landfill project and his concern with PATH is most likely due to the fact that it was authorized as part of the same legislation that authorized the World Trade Center. N.Y. Unconsol. Laws § 6603 (McKinney's 1962); N.J.S.A. 32:1-35.52 (1962).

Argument

The Port Authority of New York and New Jersey respectfully submits that the petition for certiorari should be denied since it presents no issue which, in any way, warrants consideration by this Court. The petition consists of little more than a series of abstract statements of law with absolutely no attempt being made to show their applicability to the facts or circumstances of this case. In addition, the complaint itself is totally without merit and can, without any exaggeration whatsoever, be described only as frivolous. First, the landfill project, whose legality the complaint challenges, is fully authorized by law. Its construction has been approved not only by the Corps of En-

gineers but, in addition, by Congress. Second, the validity of the World Trade Center, the other public project which the complaint questions, has been upheld in many prior law suits by both Federal and State courts, including, most importantly, by this Court. And finally, in the language of the District Court, petitioner's "request for a declaration concerning the obligations of the Port Authority 'to provide adequate financing for the continued operation of the Port Authority Trans-Hudson system' presents a non-justiciable issue; that is, there is no 'actual controversy' of which the Court might assume jurisdiction." Petition, Appendix A-7.

The District Court rejected as "frivolous" petitioner's claim that all three defendants—the United States, the Port Authority and the City—had violated petitioner's "Constitutional right to the use and benefit of waterfront property and piers and the free use of navigable rivers." Petition, Appendix A-4. It could not have done otherwise since there is no constitutional right to the commerical use of waterfront property or piers.

As to petitioner's claim that the Corps of Engineers had illegally issued a permit for the landfill project, the District Court ruled that the 1968 Congressional legislation, 33 U.S.C. § 59c-1, "had the effect of ratifying the issuance of the permit and eliminating the question of its validity by declaring the filled area to be 'non-navigable waters within the meaning of the laws of the United States' . . ."[4] Petition, Appendix A-7.

---

[4] The landfill which is the subject of this action was placed in the Hudson River in accordance with the terms of a permit validly granted by the Corps of Engineers on December 21, 1966, pursuant to § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403; see, *Wisconsin* v. *Illinois*, 278 U.S. 367, 412-13 (1929); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 486-87 (1960).

The legislation to which the Court referred was requested by the City and State of New York to facilitate the financing of the Battery Park City development. It was enacted after assurances had been given by the Corps of Engineers that the landfill project would not only have no adverse effect on navigation in New York harbor, but would in fact aid navigation by reducing the amount of floating debris resulting from the rotting and decaying piers along the lower Manhattan waterfront. *Hearings on S. 3710 before Subcommittee on Rivers and Harbors and Subcommittee on Flood Control of the Committee on Public Works, House of Representatives,* 90th Cong. 2d Sess. at 633-41 (1968); see also statement of Congressman Emanuel Celler, *Id.* at 459-60. The full text of the 1968 Act of Congress reads as follows:

> "Those portions of the East and Hudson Rivers in New York County, State of New York, lying shoreward of a line within the United States Pierhead Line as it exists on the date of enactment of this Act [August 13, 1968], and bounded on the north by the north side of Spring Street extended westerly and the south side of Robert F. Wagner, Senior Place extended easterly, are hereby declared to be non-navigable waters of the United States within the meaning of the laws of the United States. This declaration shall apply only to portions of the above-described area which are bulkheaded and filled. Plans for bulkheading and filling shall be approved by the Secretary of the Army, acting through the Chief of Engineers, on the basis of engineering studies to determine the location and structural stability of the bulkheading and filling in order to preserve and maintain the remaining navigable waterway. Local interests shall reimburse the Federal Government for any engineering costs incurred under this section." 33 U.S.C. § 59c-1.

This statute makes it clear beyond doubt that the landfill project has Congressional approval. The Report of the

House Committee on Public Works fortifies this conclusion. It states:

> "The purpose of this Section is to declare certain areas of the East and Hudson Rivers, in New York City, non-navigable, so as to permit the development of a project planned by the State and the City of New York to be built on filled lands." H.R. Rep. No. 1709, 90th Cong., 2d Sess. at 59 (1968).

The report goes on to explain:

> "This declaration of nonnavigability withdraws the Federal Government's right to order the structures removed for purposes of navigation under the commerce clause of the Constitution without compensation. This will remove a cloud on the title, and permit local interests to make financial arrangements for the development of the area for useful purposes other than navigation." *Id.*

Any conceivable question that petitioner could raise with respect to the validity of the original 1966 permit for the landfill project issued by the Corps of Engineers has been put to rest not only by Congressional action expressly approving a landfill development in the Hudson River in the very area in question but also by the subsequent action of the Corps of Engineers in January, 1972, specifically approving a new and much larger landfill project encompassing the entire landfill area which petitioner here questions. The original landfill development was constructed by the Port Authority for the City of New York and has now been incorporated into the new enlarged Battery Park City landfill project presently underway in accordance with the terms of the permit issued by the Corps of Engineers pursuant to the 1968 statute.

Petitioner's only contention as to this specific Congressional consent, which demolishes his claim of illegal fill placement, is that he has been deprived of his constitu-

tional rights by the provisions of retroactive civil legislation. But, as we have seen, petitioner has no vested right that can be impaired by any legislation whether or not retroactive.

Moreover, if petitioner is arguing that Congress has no power to sanction by subsequent act an alleged unlawful structure in the navigable waters of the United States, this argument was rejected over 100 years ago in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856). There, this Court upheld the constitutionality of a Federal statute declaring a bridge across the Ohio River at Wheeling to be a lawful structure notwithstanding the fact that four years earlier it had adjudged the very same bridge to be an illegal obstruction to navigation in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518 (1852).

We respectfully submit therefore that petitioner's allegations with respect to the legality of the landfill project and the removal of the piers fail to state a claim upon which relief can be granted, and therefore does not warrant consideration by this Court.

Petitioner also places in issue the validity of the tax-exempt status of both the World Trade Center and the Port Authority under Federal tax law. It is clear that jurisdiction over these allegations is lacking. The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, under which petitioner claimed to be suing, expressly provides that a declaratory judgment may not be made "with respect to Federal taxes." It is plain that "In this field the courts have no jurisdiction to enter declaratory judgments." *Jolles Foundation, Inc.* v. *Moysey*, 250 F.2d 166, 169 (2d Cir. 1957).

The petition and complaint also raise the question of the exemption of the World Trade Center from State taxation. While Judge Bauman stated that "I choose to decline to entertain that claim," we respectfully point out that these allegations also fail to state a claim upon which relief can

be granted. As the District Court's opinion recognizes, a number of suits attacking the World Trade Center had previously been brought and had uniformly been resolved in favor of that project's validity.[5]

Courtesy Sandwich Shop, Inc. v. *Port of New York Authority*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963), *appeal dismissed for want of a substantial Federal question*, 375 U.S. 78 (1963),[6] *rehearing denied*, 375 U.S. 960 (1963), is a clear holding for the proposition that the Trade Center constitutes a public use. There is certainly nothing invalid about exempting from taxation publicly-owned property devoted to a public use. An identical contention was determined to be without merit in *Bush Terminal Co.* v. *City of New York*, 282 N.Y. 306, 26 N.E.2d 269 (1940), a case involving the Port Authority's first

---

[5] In five previous law suits every objection to the Trade Center's validity has been found to be without merit.

1. *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963), *appeal dismissed for want of a substantial Federal question*, 375 U.S. 78 (1963), *rehearing denied*, 375 U.S. 960 (1963);
2. *Matter of Port of New York Authority (World Trade Center)*, 18 N.Y.2d 250, 219 N.E.2d 797, 273 N.Y.S.2d 337 (1966), *certiorari denied sub nom. McInnes* v. *Port of New York Authority*, 385 U.S. 1006 (1967);
3. *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 387 F.2d 259 (2d Cir. 1967), *aff'g* 270 F. Supp. 947 (S.D.N.Y. 1967);
4. *Merns, Inc.* v. *Department of Highways of City of New York*, N.Y.L.J. June 26, 1967, p. 15, cols. 7-8 (Sup. Ct., N.Y. Co.);
5. *Wien* v. *Port of New York Authority*, 23 N.Y.2d 668, 242 N.E.2d 746, 295 N.Y.S.2d 491 (1968), *aff'g* 29 A.D.2d 847, 288 N.Y.S.2d 592 (1st Dept. 1968), *aff'g* N.Y.L.J. August 4, 1967, p. 8, cols. 2-6 (Sup. Ct., N.Y. Co.).

[6] This Court's action in dismissing an appeal for want of a substantial Federal question constitutes, of course, a decision on the merits. See, *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959).

inland freight terminal. There, Chief Judge Lehman, relying upon a decision by this Court, stated:

> "A municipality or agency of the State carrying out a public purpose may at times compete with private business. Those owning the private business are not deprived of their right to the equal protection of the law, guaranteed by the Constitution of the United States, because the private business is subjected to a tax from which the State agency is immune. (*Puget Sound Power & Light Co.* v. *County of King,* 264 U.S. 22.)" 282 N.Y. at 322.

We emphasize, however, that while the Trade Center is exempt from taxation, its authorizing legislation makes express provision for substantial in lieu-of-tax payments by the Port Authority to the City of New York, N.Y. Unconsol. Laws § 6611 (McKinney's 1962); N.J.S.A. 31:1-35.60 (1962), and the Authority has, in fact, entered into an in-lieu-of-tax agreement obligating it to make such payments.

Moreover, petitioner's characterization of the Trade Center as "a real estate business" adds nothing to the argument. Similar unfounded characterizations were set forth, without success, in the prior cases listed in footnote 5, *supra.*

Finally, petitioner makes two references in his complaint to PATH. He correctly states that statutory authorization for the Port Authority's operation of the railroad is contained in the same legislation which directs it to construct the World Trade Center. Also, he asks the court to declare "the obligations of the defendant, THE PORT OF NEW YORK AUTHORITY, to provide adequate financing for the continued operation of the Port Authority Trans-Hudson system." Not only do these allegations fail to raise a Federal question but, as recognized by the District Court, they fail to present an "actual controversy," the absolute prerequisite for Federal Court jurisdiction under Article III of the Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICK J. FALVEY
General Counsel of, and Attorney for Respondent The Port Authority of New York and New Jersey
Office and P. O. Address
111 Eighth Avenue
New York, New York 10011
Tel. 620-7380

On the Brief:

JOSEPH LESSER
Assistant General Counsel and Chief, Opinions and Appeals Division

ISOBEL E. MUIRHEAD
Deputy Chief, Opinions and Appeals Division

RALPH SALTZ
Attorney

New York, N. Y.
February 23, 1973

Proof of Service

I, PATRICK J. FALVEY, a member of the Bar of the Supreme Court of the United States, and General Counsel of, and attorney for, Respondent The Port Authority of New York and New Jersey, hereby certify that on the 23rd day of February, 1973, I served copies of the foregoing brief on counsel for Petitioner and Counsel for the other Respondents, by mailing three copies thereof in a duly addressed envelope, with air mail postage prepaid, to each of the following in this cause:

JACOB RASSNER, ESQ.
Counsel for Petitioner
15 Park Row
New York, N.Y. 10038

ERWIN N. GRISWOLD, ESQ.
Solicitor General of the United States
Counsel for Respondent United States
Department of Justice
Washington, D.C. 20530

NORMAN REDLICH, ESQ.
Corporation Counsel of the City of New York
Counsel for Respondent City of New York
Municipal Building
Centre and Chambers Streets
New York, N.Y. 10007

/s/ PATRICK J. FALVEY
PATRICK J. FALVEY

Service of [illegible] copies of the within
is admitted this [illegible] day of 19

_____

FILE COPY

Supreme Court, U. S.
FILED
MAR 16 1973
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-1028

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Officer of Local 856, and on behalf of all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishment of the World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Petitioner,

-against-

UNITED STATES OF AMERICA,
THE CITY OF NEW YORK,
and THE PORT OF NEW YORK AUTHORITY,

Respondents.

REPLY BRIEF TO THE BRIEFS ON BEHALF OF RESPONDENTS, THE PORT OF NEW YORK AUTHORITY AND THE CITY OF NEW YORK

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N.Y.
BA 7-2618

DICK BAILEY SERVICE, INC. Telephone: (212) 447-5358

FILE COPY

TABLE OF CONTENTS

Page

POINT I — Both Respondents Have Truncated The Questions Presented And By Means Of Legalistic Legerdemain And Have Attempted To Camouflage The True Questions Presented, By Obscuring The True Issue And Submitting Alien Questions To The Questions Involved. 2

POINT II — Respondents' Citations Refer To Unrelated Concepts Of Law. 4

Conclusion 8

Cases Cited

Appleby v. City of New York, 235 N.Y. 351, 139 N.E. 474 (1923), rev'd o.g., 271 U.S. 364 (1926) 6

Bush Terminal Co. v. City of New York, 282 N.Y. 306, 26 N.E. 2d 269 (1940) 5

Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 N.Y.2d 379, 190 N.E. 2d 402, 240 N.Y.S. 2d 1 375 U.S. 78 (1963), rehearing denied, 375 U.S. 960 (1963). 4

Delaware and Hudson Coal Co. v. Lawrence, 2 Hun. 163 (N.Y. Sup. Ct., 1873), aff'd 56 N.Y. 612 (1874) 6

Gilman v. Philadelphia, 3 Wall. (70 U.S.) 713 (1865) 6

Langdon v. Mayor, 93 N.Y. 128 (1883) 6

Matter of Port of New York Authority (World Trade Center), certiorari denied sub nom. 4

Merns, Inc. v. Department of Highways of City of New York, N.Y.L.J. June 26, 1967, p. 15, cols. 7-8 (Sup. Ct., N.Y. Co.). 4

Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518 (1952), 18 How. 421 (1856) 5

People v. N.Y. and S.I. Ferry Co., 68 N.Y. 71 6

Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F. 2d 259, (2d Cir. 1967), aff'g 270 F. Supp. 947 (SDNY 1967) 4

Sound Marine & Machine Corp. v. Westchester County, 100 F. 2d 360 (2d Cir. 1939) 6,7

United States v. Republic Steel Corp., 362 U.S. 482 (1960) 5

Utah v. United States, 403 U.S. 9, 91 S. Ct. 1775 (1971) .. 7

Wien v. Port of New York Authority, 23 N.Y. 2d 668, 242 N.E. 2d 746, 295 N.Y.S. 2d 491 (1968), aff'g 29 A.D. 2d 847, 288 N.Y.S. 2d 592 (2d Dept. 1968), aff'g N.Y.L.J. August 4, 1967, p. 8, cols. 2-6 (Sup. Ct. N.Y.Co.) 4

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-1028

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Officer of Local 856, and on behalf of all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishment of the World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Petitioner,

-against-

UNITED STATES OF AMERICA,
THE CITY OF NEW YORK,
and THE PORT OF NEW YORK AUTHORITY,

Respondents.

REPLY BRIEF TO THE BRIEFS ON BEHALF OF RESPONDENTS, THE PORT OF NEW YORK AUTHORITY AND THE CITY OF NEW YORK

POINT I

BOTH RESPONDENTS HAVE TRUNCATED THE QUESTIONS PRESENTED AND BY MEANS OF LEGALISTIC LEGERDEMAIN AND HAVE ATTEMPTED TO CAMOUFLAGE THE TRUE QUESTIONS PRESENTED, BY OBSCURING THE TRUE ISSUE AND SUBMITTING ALIEN QUESTIONS TO THE QUESTIONS INVOLVED.

Respondent, United States of America, served no opposition as yet.

The City of New York, on pages 4, 5, 8 and 9 and The Port of New York Authority on pages 5 and 6 of their briefs, have submitted the question of ownership and operation of certain piers.

This is not a relevant or pertinent question.

The ownership and operation of the piers was never claimed by petitioner.

Both respondents take the position that the part of the Hudson River in question was non-navigable. This position is based on erroneous concept in conflict with common knowledge and true fact, as well as petitioner's affidavit submitted to the Trial Court that the area in question was in continuous daily operation, employing thousands of citizens and utilizing hundreds of ships, as well as maintaining and repairing docks and piers at a recent expenditure of millions of dollars.

This is also in clear conflict with well established and uniform law, as pointed out on page 7 of petitioner's brief.

The argument that the elimination of the piers on the alleged basis of "in aid of navigation" has no support in fact and is contrary to the uncontroversial and admitted charge that the Hudson River fill was used as a foundation for real estate business, with a refusal by respondents to stand by their agreement that they would aid in establishing a terminal in aid of navigation.

Another example of the attempted diversion from the true question presented is the reference on page 9 of the brief of respondent, The Port of New York Authority, to Judge Bauman's statement "I choose to decline to entertain that claim", referring to the question of taxes.

Respondent's brief speaks of "federal tax law" whereas petitioner raises the question of illegal City tax benefits depriving citizens of New York City of some twenty-five million dollars in tax revenues annually. Not federal taxes.

The fact remains that it is common knowledge that the economy of the City of New York has been seriously affected by respondents destroying its position as the leading sea port in the world and changing it to one where practically all the steamship companies formerly coming to the Hudson River at the New York side of downtown Manhattan, are barred from the use of the river, which is now a wasteland preparatory to becoming a private real estate project.

POINT II

RESPONDENTS' CITATIONS REFER TO UNRELATED CONCEPTS OF LAW.

For example, the citations on page 10 of brief of The Port of New York Authority, footnote 5, refers to the following cases:

Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 N.Y. 2d 379, 190 N.E. 2d 402, 240 N.Y.S. 2d 1 (1963) 375 U.S. 78 (1963), rehearing denied, 375 U.S. 960 (1963). This case deals with the question of condemnation of private property, with no reference to the dumping of refuse into navigable waters.

Matter of Port of New York Authority (World Trade Center), certiorari denied sub. nom. *McInnes v. Port of New York Authority*, 385 U.S. 1006 (1967). 18 N.Y. 2d 250, 219 N.E. 2d 797, 273 N.Y.S. 2d 337 (1966). This case deals with condemnation of reality, not obstruction of navigation.

Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F. 2d 259 (2d Cir. 1967), aff'g 270 F. Supp. 947 (S.D.N.Y. 1967). This case deals with reducing the grade of a post office employee.

Merns, Inc. v. Department of Highways of City of New York, N.Y.L.J. June 26, 1967, p. 15, cols. 7-8 (Sup. Ct., N.Y.Co.). There is nothing in this case comparable to the questions involved in the subject matter of the petition herein.

Wien v. Port of New York Authority, 23 N.Y. 2d 668, 242 N.E. 2d 746 295 N.Y.S. 2d 491 (1968), aff'g 29 A.D. 2d 847,

288 N.Y.S. 2d 592 (1st Dept. 1968), aff'g N.Y.L.J. August 4, 1967, p. 8, cols. 2-6 (Sup. Ct., N.Y.Co.). This case dealt with an inland television broadcasting station, not interference with maritime shipping.

Petitioner does not question the holding in *Bush Terminal Co. v. City of New York*, 282 N.Y. 306, 26 N.E. 2d 269 (1940), cited on page 10 of respondent's brief, which treats with the question of an inland terminal as to exemption from taxation of property devoted to a public use.

The question of public use is a controversial issue. Petitioner's complaint is based on the fact that a real estate operation for private profit and use is not in anywise devoted to, but on the contrary, is destructive of public rights and constitutes unfair tax exemption.

The holding in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856) 13 How. 518 (1952), cited on page 9, in nowise changes the controlling law that a river navigable, in fact, cannot be declared non-navigable as a matter of law.

On page 6 respondent cites *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). Respondent truncates the holding in said case. The Court, at page 889 makes it quite clear that the term "obstruction" as used in the Rivers and Harbors Act refers to any deposit which affects the navigable capacity of the river. No the entire river.

As heretofore stated, it is a matter of common knowledge that shipping on the New York side of lower Manhattan has been substantially, if not completely, eliminated by the obstruction.

As to the authorities cited by the respondent, The City of New York, the case of *Langdon v. Mayor*, 93 N.Y. 128 (1883) cited at page 5, speaks of "control" of wharves and wharfage. Petitioner never claimed the right to such control.

The case of *Delaware and Hudson Coal Co. v. Lawrence*, 2 Hun. 163 (N.Y. Sup. Ct., 1873), aff'd 56 N.Y. 612 1874) on page 7, infers that petitioner seeks greater rights than the general public. Nothing can be further from the truth. Petitioner is acting not only on his own behalf and the thousands of people employed in the industry which he represents, but also on behalf of all citizens who are burdened by the unlawful tax favoritism involved herein.

The glib statement on the alleged authority of *Gilman v. Philadelphia*, 3 Wall. (70 U.S.) 713 (1865), cited on page 9, that there is no federal jurisdiction is the very statement which petitioner claims constitutes error as a conflict with well settled law, as pointed out in petitioner's brief.

Further indulgence in truncating decisions is demonstrated by respondent citing the case of *People v. N.Y. and S.I. Ferry Co.*, 68 N.Y. 71, on page 5 in support of its argument, by the tenuous argument that because Congress has the power to regulate commerce, it may violate constitutional rights and deprive citizens of their opportunity to make a livelihood and to declare waters navigable in fact to be non-navigable as a matter of law.

On page 7 of its brief, respondent cites *Sound Marine & Machine Corp. v. Westchester County*, 100 F. 2d 360, (2d Cir. 1939), cert. den. 306 U.S. 642 (1942) and *Appleby v. City of New York*, 235 N.Y. 351, 139 N.E. 474 (1923), rev'd o.g., 271

U.S. 364 (1926), on the basis that navigation is a public right and erroneously concludes that thereby the State of New York and the City did not deprive the petitioner and citizens of the State of New York of vested rights, and had the power to dump thousands of tons of refuse and fill into the Hudson River.

In point is the comment by the Court in *Sound Marine & Machine Corp. v. Westchester County*, supra at page 362 which stated:

> "As a practical matter, a maritime right is thus invaded by a pipe running from the land under an easement by virtue of which the sewer derives its right of passage through the old channel."

The fill in the case at bar is far more extensive than that caused by the sewer pipe in the aforementioned case.

A reading of the opinion in *Utah v. United States*, 403 U.S. 9, 91 S. Ct. 1775 (1971), cited by petitioner on page 7 of its brief, has been misinterpreted by respondent on page 9 of its brief.

CONCLUSION

It is respectfully submitted that the petition merits consideration by this Honorable Court in the furtherance of substantial justice, as well as being one of general public concern.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1028

FRED R. FIELD, JR., ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, on behalf of himself and "some 20,000 longshoremen of his Union" (Pet. 3), commenced the present action in the United States District Court for the Southern District of New York under the Declaratory Judgment Act, 28 U.S.C. 2201, and the Federal Tort Claims Act, 28 U.S.C. 1346. The complaint essentially challenged a Corps of Engineers' permit, issued in December 1966 to respondent The Port of New York Authority,[1] to deposit in a designated area (covering approximately 23.5 acres) in the Hudson River, as part of a landfill-development project, fill from excavation at the nearby World Trade Center site. Petitioner asked that the permit be declared illegal, not because its issuance had been improper under the applicable statute (33 U.S.C. 403) or regulations (33

---

[1]The Port of New York Authority has since become the Port Authority of New York and New Jersey.

C.F.R. 209.110 *et seq.*), but because it would have the effect of eliminating Piers 3 to 13 on the river, thereby depriving members of the represented class of their so-called "'Constitutional right to the use and benefit of waterfront property and piers and the free use of navigable rivers'" (Pet. App. A 4). In addition, the complaint separately sought a declaration that the grant by the States of New York and New Jersey of tax exempt status to the World Trade Center illegally deprived citizens of New York City of tax revenue (Pet. App. A 5).

Respondents moved in the district court for dismissal of the suit for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The district court granted the motions (Pet. App. A 3-9) and the court of appeals affirmed (Pet. App. A 1-2).

The decision below is correct and does not warrant review by this Court.

1. Petitioner seeks to invoke the district court's jurisdiction under the Declaratory Judgment Act, 28 U.S.C. 2201. But, as that court pointed out, citing *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671, 672, that "Act by itself does not confer subject matter jurisdiction on the federal district courts" (Pet. App. A 5). Moreover, no claim has been made that the Corps of Engineers' action in 1966 exceeded its permit authority in 33 U.S.C. 403, or the regulations promulgated thereunder (32 C.F.R. Part 209.110 *et seq.*). And, in 1968, Congress specifically ratified the permit involved here, as the district court observed (Pet. App. A 7; footnotes omitted), "by declaring the filled area to be 'nonnavigable waters of the United States within the meaning of the laws of the United States' [82 Stat. 736, 33 U.S.C. 59c-1], thus removing the matter from the ambit of Title 33, U.S. Code, Section 403."

2. Petitioner's reliance on the Federal Tort Claims Act 28 U.S.C. 1346, as an alternative jurisdictional basis for this action also is unfounded. That statute confers jurisdiction only over claims against the United States for "money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * *." This plainly is not such a case. The district court correctly held (Pet. App. A 6):

> [Petitioner's] claim of damage rests on the assertion that he or the longshoremen or seamen who had worked there [on Piers 3 to 13] will find no employment at that place in the future. At most, this might constitute an interference with contract rights. But even assuming such an interference, the Federal Tort Claims Act by its terms provides that it shall not apply to "any claim arising out of . . . interference with contract rights." Title 28, U.S. Code, Section 2680(h).

3. Finally, the district court properly declined to entertain petitioner's challenge to the grant by the States of New York and New Jersey of tax exempt status to the World Trade Center. As it pointed out (Pet. App. A 8, "[i]ssues of state taxation and public law are more appropriately heard in the state courts, at least in circumstances such as these." The court noted (*ibid.*), moreover, that "the New York Courts have already entertained a number of suits attacking the constitutionality of that Legislation [granting tax exempt status to the Center] and have uniformly resolved them in favor of the project."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.